INNES' DIGEST OF LAW OF EASEMENTS

THIRD EDITION

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A DIGEST

OF THE

ENGLISH LAW OF EASEMENTS.

BY

MR. JUSTICE INNES,

LATELY ONE OF THE JUDGES OF HER MAJESTY'S HIGH COURT OF JUDICATURE, MADRAS.

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PREFACE TO THIRD EDITION.

In this third edition I have taken the opportunity to refer to the cases decided since the publication of the second edition. I have introduced some changes in arrangement and in the language of some of the sections, and have added some rules and illustrations suggested by recent cases.

L. C. INNES.

Dover,
August, 1884.

PREFACE TO SECOND EDITION.

THE first edition of this work was published in Madras early in March, 1878. The appreciation of it by members of the profession in India has induced me to proceed to a second edition in England. I have added an Index, which will facilitate reference to the several matters treated of, and have in other respects endeavoured to make the present edition an improvement upon the first.

L. C. INNES.

WANSTEAD, ESSEX,
July, 1880.

PREFACE TO FIRST EDITION.

On taking his seat as the Legal member of the Viceregal Council, Mr. Whitley Stokes announced the intention of the Council to take in hand without delay the work of codification, in almost the entire remaining field of law in which codification has not yet been attempted. Among other subjects he mentioned that of Servitudes.

It occurred to me that in some respects as a guide and in others as a means of pointing out difficulties which, in framing an Indian Code, it would be well to avoid, the completion of a work which I had for some time had in hand—a Digest of the English Law of Easements, a branch of law which is included in the somewhat more comprehensive law of Servitudes—might prove useful as a preliminary step towards the preparation of a Chapter of the Indian Code on the subject.

I have omitted what are called customary Easements, as they are either not Easements

properly so called, or if Easements, are so by prescription, and not by custom, and are properly classed as Easements by Prescription.

I have added a Section on Licenses, as is usual in treatises upon Easements. The subject is related to that of Easements, and each tends to throw light upon the other. Rights usually styled rights *ex jure naturæ* are also treated of, though they are not Easements, for a similar reason.

There is much in the English law that might be adopted without mischief or difficulty in India; as the law relating to Rights of Way, Support of Land or Buildings, Air and Light.

In regard to Rights of Water (with exception of such rights as are styled Rights *ex jure naturæ*, or as I prefer to call them, "Rights arising from situation independent of a right of Easement"), I certainly trust the Legislature will not think of adopting the English model. Rights *ex jure naturæ* are simple and natural, and are incompatible with an excessive or unfair use of the object. But Easements in water are of a highly artificial and complex character, and in a country the welfare of which is, in many provinces, so dependent upon a fair and even distribution of water, are liable to result, I fear, in great injury to whole communities.

The evidence of a few false witnesses in a Court of first instance may often become the basis of a decision as to individual rights which the Appellate Court may not be in a position to reverse; and the level of the water hitherto flowing to many a village may thus become so lowered as to deprive large tracts of lands of the accustomed overflow, to the ruin of the landholders who are dependent upon it for their livelihood.

The irrigation officers in the Madras Presidency are well aware of the mischievous effects arising from the establishment of these rights, but are powerless in the face of the decisions of the Courts of Law, and must recognize and tolerate them however great may be their inconvenience.

I am not one of those who persistently deny the existence of property in the soil in India to any but the sovereign and the statutory proprietors. On the contrary, I hold views in regard to the rights of the ryots in the soil which may seem inconsistent with what I am about to advocate. If, as I believe, they have by the ancient custom of the country an emphyteutic title, which the British Government has sometimes recognized, more frequently ignored, but never expressly denied, it may

seem unreasonable that with so permanent an interest in the soil they should not be allowed to acquire, over neighbouring tenements, such Rights in Water in the nature of Easements as have grown up in England.

But in India, I think, the well-being of most communities points to the necessity of great economy in water, and of the regulation of its distribution in the interests of all, in proportions as far as possible adjusted to the extent of the wants of the lands of each cultivator; and to allow an individual by the fiction of a grant from his neighbours to acquire the right to dam up, pen back, or divert water, is incompatible with a fair and even distribution.

The decisions as to Rights in Water in Madras have been few, but have not been unimportant; and some important decisions are unreported. (See Appendix.)[1]

They have not covered a very extended portion of the subject, but it is impossible to say how rapidly the notion of rights of easements in water may grow; and it would be well if the Legislature would step in in time, and place the Government in such a position in regard to the rivers and streams serviceable for irrigation,

---

[1] The Appendix is omitted in the present (third) edition.

as to give it, once for all, entire control over the fair and even distribution of water.

I have not added an Index, as the Table of Contents is so framed as to supply the place of one in so small a volume.[1]

The Digest is founded principally upon the treatises of Gale and Goddard. I have quoted most of the cases which are of more recent date than the latter work.

I trust that the labour (which has not been light) of preparing this Digest may not have been altogether thrown away, and that the work may prove of use to the profession and the public.

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[1] In this second edition I have thought it better to add an Index.

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DIGEST

OF

THE ENGLISH LAW OF EASEMENTS

THE Law of Easements is a branch of the Law of Servitudes, or rights *in alieno solo*.

Servitudes may be defined as follows:—

A right of servitude is a right by which a person, by virtue of his interest in a certain tenement, is entitled to claim by way of advantage or convenience to his tenement that the possessor of a neighbouring tenement shall submit to something being done by him affecting such neighbouring tenement, or shall forbear from doing something on such neighbouring tenement.

Servitudes may be servitudes with a right to make a profit out of the substance of the neighbouring tenement; as a right to take turf, or dig for minerals.

These are called Profits *à prendre*.

Or they may be servitudes without such a

right, and with simply the right to claim submission or forbearance.

These are called Easements.

The present work does not treat of Profits *à prendre.*

Of Easements Generally.

In the case of easements the tenement in respect of which the advantage or convenience is claimed, and the advantage or convenience which is the object of the claim, must both have a permanent existence, or an existence which is intended to continue for a defined term.[1]

Illustration.

A builds a workshop in front of his house. It is built upon posts which are fixed in stone plinths, and these rest on some slight brickwork. The purpose of it was temporary, and it is not fixed to the freehold. The shop has windows which receive light from the tenement of B. Notwithstanding the temporary character of the structure its existence is continued for 20 years. B at length builds so as to obstruct the light coming to A's shop windows. In consequence of the temporary character of the structure, an easement of light cannot be acquired, and an action by A against B fails.

The rights called Easements may come into existence in several ways.

(1.) By express public grant by an Act of the Legislature.

---

[1] *Maberly* v. *Dowson*, 5 L. J. K. B. 261.
Arkwright v. *Gell*, 5 M. & W. 203; 8 L. J. N. S. 201.

(2.) By express private grant.

(*a*) *inter vivos.*

(*b*) by testament.

(3.) By implied grant, when the intention is implied to grant the easement together with property which is *expressly* granted:—

as on a severance of tenement.

(4.) By prescription, which requires enjoyment as of right for a particular period.

Prescription is either by (*a*) Common Law.

or by (*b*) Statute.

The tenement in respect of which the owner enjoys the easement over the other is called the dominant tenement. That over which the easement is enjoyed is called the servient tenement.

Easements are

Affirmative.—Such as authorize the commission by the dominant owner of acts which invade the right of the servient owner (*a*).

Negative.—When the owner of the servient tenement is restricted in the exercise of the natural rights of property by the existence of the easement (*b*).

Continuous.—Of which the enjoyment is or may be continual without the interference of man (*c*).

Discontinuous.—The enjoyment of which can only be had by a fresh act on each occasion of the exercise of the right (*d*).

Apparent.—With external signs of existence (*e*).

Non-apparent. — Without such external signs (*f*).

Illustrations.

(*a.*) A has a right of way over B's land.

A has a right to discharge water into B's land.

(*b.*) A having ancient windows giving access of light to his house from B's land, B is restricted in his right to build on his own land so as to obstruct the light passing to A's windows.

(*c.*) A having ancient windows enjoys a right to light from the land of B.

A enjoys a right to the passage of rain water by a gutter from his house along the house of B.

(*d.*) A has a right of way over B's ground.

A has a right to divert water flowing to B's land.

(*e.*) A has a right to pass through a door on B's premises and by a path beyond it, to get to his own house.

A has a right of access of light to his house through his ancient windows from the lands of B.

A has a right to dam up a watercourse on his own lands below the lands of B.

In these rights there exist the external signs of the door, the path, the windows, and the watercourse.

(*f.*) A has an ancient building bordering on the boundary between his land and that of B, and has acquired an easement to the lateral support of his land weighted with the building by B's land. Here the right, which is a right of A to continue to rest the weight of his building on the support afforded by B's land, and to restrict B from removing the lateral support afforded by his land, is a non-apparent easement.

Some Easements present both positive and negative characteristics, as in the last illustration in which the easement is enjoyed by the thrust upon B's land arising out of the continuing consequences of the original act of A in weighting his land with buildings, and the abstention

of B from interfering with his own land in a way to remove the support it has hitherto afforded to A's building.

The terms of the grant, or the circumstances from which it is to be inferred, must express or imply continued use, or use perpetually recurring, though at uncertain intervals.

For the purpose of acquiring an easement the possession of a tenant is that of his landlord.

A tenant cannot therefore acquire an easement for himself by prescription against his own landlord, or against a tenant of his own or of another landlord.[1]

The interest in property, in respect to which a person may by express grant acquire an easement over neighbouring property, is not required to be the entire interest.

Illustration.

(*a.*) A being owner of certain premises lets them to B for twenty-one years *with all lights*. A is at this time under-lessee of adjoining premises for a term of which four years remain unexpired. During the term of A's underlease B has an easement of light to his premises from those occupied by A.[2]

Though a tenant cannot by prescription acquire for himself an easement over a neigh-

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[1] *Russell* v. *Harford*, L. R. 2 Eq. 507.
Gayford v. *Moffatt*, L. R. 4 Chy. App. 133.
Outram v. *Maude*, 17 Ch. Div. 391; 50 L. J. Ch. 783; 29 W. R. 818.

2 *Booth* v. *Alcock*, L. R. 8 Ch. 663; 42 L. J. Ch. 557.

bouring tenement, he may so acquire such a right on behalf of his landlord.

An easement can only be acquired by a *person;* not a congeries of persons.

Several joint owners of property form in respect of that property a person.

A corporation is a person. Variable bodies of individuals, such as the inhabitants of a village, or parishioners of a parish, are not persons, and cannot prescribe for a right of easement, but can only claim by custom.[1]

Illustrations.

(*b.*) A has a right to a passage for the rainwater falling upon his house by a gutter passing from his house over the house of B adjoining.

(*c.*) A, a riparian proprietor, has acquired a right to dam up the stream, by which the land of B above the property of A is occasionally flooded; and the mill of C below the property of A receives less water than it otherwise would do.

The right of A in each of the above two instances is an easement.

(*d.*) A has a house with several windows opening upon the ground of B, and receiving light from that direction; and A has been receiving light through these windows uninterruptedly for the period prescribed by the Statute to entitle him to an easement of light. A has acquired an easement of light over B's tenement, and B is precluded from building on his ground in such a position as to obstruct the passage to A's house of the usual amount of light.

Explanation.—A right of prospect cannot be acquired.

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[1] *Gateward's Case*, 6 Coke, 60.
Foxall v. *Venables*, Cro. Eliz. 180.
Mounsey v. *Ismay*, 3 H. & C. 486; 34 L. J. Exch. 52.
Constable v. *Nicholson*, 14 C. B. N. S. 230; 32 L. J. C. P. 240.

In the case in illustration (*d*) B may build so as to obstruct the view from A's house, though he must not build so as to obstruct the light.

(*e.*) A dams up a stream for the period required to enable him to acquire a prescriptive right; and during that period a portion of the tenement of B higher up is in consequence constantly flooded. But a portion of A's ground is also flooded from the same causes, and A has so acted without the object of benefiting his own tenement, which in fact he has *not* benefited, but with the object of enabling C, a relation on the opposite side of the stream, to work a mill on property not belonging to A.[1]

A has not acquired an easement to dam up the stream.

(*f.*) A is a tenant of B, and occupies land of B adjoining other land of B. A cannot by prescription acquire an easement over the adjoining land of B, but he may by express grant from B acquire a right, which though not an easement is in the nature of an easement.[2]

For the purpose of acquiring Easements of Light, by prescription under the Prescription Act, holders of leaseholds of houses are, as against other leaseholders of houses of the same or different lessors, regarded as holding separate tenements in respect of which they can, as against each other, acquire rights in the nature of easements of light for the term of their several holdings.

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[1] *Keppel* v. *Baily*, 2 Myl. & K. 535.
Ackroyd v. *Smith*, 10 C. B. 164; 19 L. J. C. P. 315.
Hill v. *Tupper*, 2 H. & C. 121; 32 L. J. Exch. 217.
Ellis v. *Mayor of Bridgnorth*, 15 C. B. N. S. 52; 32 L. J. C. P. 273.

[2] *Gayford* v. *Moffatt*, L. R. 4 Chy. App. 133.

Illustration.

A and B occupy opposite houses, the property of their lessor C. A can acquire against B, by prescription, a right (to enure during the term of his tenancy) that B shall not obstruct the light passing from B's to his house.[1]

1 & 2.—Of Easements by Express Grant.

The rights in such easements, whether created by an Act of the Legislature or otherwise, depend on the terms of the grant, and need not be treated of here.

Easements by express private grant, except by testament, can in England be only created by instruments under seal (as in the case of all incorporeal hereditaments).

3.—Of Easements by Implied Grant.

Easements by implied grant arise upon severance of a tenement by the owner.

A man cannot have an easement in his own property, whereby, during unity of possession, one portion of it is servient to another.

Illustration.

A has an inclosure in which are two houses; and a way passes from one to the other, which is convenient for the enjoyment of both tenements. During A's possession of the entire premises, the one tenement is not said to be servient to the other.

The owner cannot therefore subject one part

Frewen v. *Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356.

of his property to another by an easement; but, by the general right of property, he can make one part of it dependent on another, and grant that part with this dependence to another person.

Where an owner of two tenements severs them, the question of whether he conveys the portion which he divides off from the other under the implied covenant that each shall be enjoyed with all the advantages, *not being easements of necessity*, which it possessed in relation to the other before the severance, is in each case a question depending either upon the construction of the grant, or upon the facts and circumstances of the case.

Of Continuous and Apparent Easements and Easements of Necessity.

On severance of a tenement by transfer or devise of a portion of it or otherwise, a grant to the grantee or reservation to the grantor will be implied,

(*a.*) Of all those conveniences of a continuous[1] and apparent character which one part of the tenement derives from another and which have in fact been used by the owner during the unity, and which *are required* for the use of the

[1] *Poldon* v. *Bastard*, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92.

part conveyed or the part reserved respectively, though they have had no legal existence as easements;[1]

(*b.*) And of all those easements, without which the enjoyment of the severed portions could not be had at all.

These latter are called easements of necessity.

Where the intention of the vendor is not expressed by the terms of a grant in writing, but is expressed by an act which is inconsistent with his having granted (as appurtenant to the tenement sold) a convenience theretofore used over the tenement which he retains, such convenience, unless it be one of necessity, is not conveyed to the vendee.

Illustrations.

A buys a tenement, from part of which ('*a*') water flows through a pipe to another part ('*b*'). A cuts the pipe and stops the flow of water which was not necessary to the enjoyment of the portion '*b*'. He then sells '*b*' to C. The convenience of the flow of water is not conveyed to C by the mere sale to him of the tenement '*b*'.[2]

A purchased one of three detached villas, No. 1; B then purchased the other two, Nos. 2 and 3. There was a gate in front of No. 1 and a gate in front of No. 3, and a drive in front of the villas connecting the gates, and intended for use for the three villas. The conveyance to A comprised the land in front of

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[1] *Francis* v. *Hayward*, 20 Ch. D. 773; 52 L. J. Ch. 12. *Watson* v. *Troughton*, 48 L. T. 508.

[2] (Dame Brown's Case) *Moore* v. *Brown*, Dyer, 420.

No. 1 up to the road. A put up a fence to prevent B from using the drive in front of A's villa. B brought an action to restrain A's interference with B's right of way in front of A's villa. The right of way was not expressly reserved in A's conveyance, nor was the grant expressed in B's conveyance; if it had been this could not have prejudiced A, whose conveyance was prior to B's, nor could such a grant be implied, because the convenience was not absolutely required for the use of the part conveyed.[1]

Illustrations of Easements of Necessity.

(*a.*) A is the owner of two adjoining houses. A gutter runs along the top of both houses which carries off rainwater.

The flow is from house '*a*' to house '*b*.'

A sells house '*a*' to B, and then house '*b*' to C. C cannot restrain B from letting the water pass by the portion of the gutter appurtenant to C's house, because C takes only the rights of A, and the passage of the water by the gutter, though not an easement, is a continuous and apparent convenience used by the owner during the unity of possession, and necessary for the use of the tenement conveyed to B.[2]

(*b.*) A is the owner of a house under which a drain runs to the sewer.

A divides this into two portions, '*a*' and '*b*,' under which the drain runs from '*a*' to '*b*' and so under '*b*' to the sewer.

A sells '*b*' to C without express reservation of the right to discharge the contents of the drain through such part of the drain as runs under the tenement sold to C; and afterwards sells '*a*' to D. D has a right to discharge the contents of the drain under his house through that portion of the drain which is under C's house, because, though not an easement, this convenience was used by the owner during unity of possession and at the time of the sale to C, and is necessary for the use of the tenement '*a*.' A reservation of the right was therefore implied

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[1] *Johnson* v. *Pate*, Ch. D. 1884, L. Journal Notes of Cases, p. 60.

[2] *Coppey* v. *J. de B.*, 11th Hen. VII.

at the time of the sale C, and the right passes to D on sale to him of the tenement '*a*.'[1]

(*c*.) A possesses two tenements. From the tenement '*a*' a stream of water runs to tenement '*b*' and fills a pool appurtenant to '*b*.' The pool is necessary to the enjoyment of the tenement '*b*.' A sells '*b*' to C. A cannot stop the flow of water to C's pool.[2]

(*d*.) A has two closes, '*a*' and '*b*.'

'*a*' is only accessible by a path through '*b*.' A sells '*a*' to C and afterwards sells '*b*' to D.

C has a way of necessity through '*b*' by implied grant. But supposing that A sells '*b*' first to D and retains '*a*' himself for some time and afterwards sells '*a*' to C, A would by implied reservation have a way of necessity through the close sold to D; and on his conveying to C the latter also would have this privilege.[3]

(*e*.) Pipes convey water from estate '*b*' to estate '*a*.' Both belong to one person A. He sells '*a*' to B and afterwards sells '*b*' to C. The water is necessary to the enjoyment of the estate '*a*.' C cannot cut off the water from B.[4]

Except in the case of continuous and apparent easements, such easements as are not of necessity will not be held to pass without express words, such as "therewith used and enjoyed," &c.

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[1] *Pyer* v. *Carter*, 1 H. & N. 922; 26 L. J. Exch. 258.

[2] *Sury* v. *Pigott*, Popham's Rep. 166; Tud. L. C.

[3] *Pinnington* v. *Galland*, 9 Exch. 1; 22 L. J. Exch. 348.

[4] *Watts* v. *Kelson*, L. R. 6 Ch. 166; 40 L. J. Ch. 126.
See the recent case of *Sherbrook* v. *Tuffnell*, 46 L. T. 886.

NOTE.—In the case of *Suffield* v. *Brown*, Lord Westbury dissented from the decision in *Pyer* v. *Carter*, saying that in all such cases the vendor took according to the terms of his conveyance, and not according to the disposition of tenements, and that it was undesirable to introduce the fiction of an implied reservation by the grantor of a right which he did not expressly reserve in his conveyance.

4.—Easements by Prescription.

PRESCRIPTION AT COMMON LAW.

Prescription at Common Law is a mode of acquiring property by showing that the use of it has been immemorially enjoyed by the claimant and those through whom he claims, and by thereby raising the presumption of a grant having been originally made of it.

Proof of usage for a period of reasonable length, which was at one time thought to require a period of no less duration than from the 1st year of Richard the First, has been considered sufficient evidence of immemorial usage.

Such a period is not sufficient unless it is of such a length as to raise the presumption of a grant having been made originally and since lost.

A grant may be presumed to have been made at a remoter period and lost, if uninterrupted enjoyment for twenty years is shown.

There can be no prescription at common law in the following cases:—

If the claim be in conflict with a statute.

If it be at variance with a prescriptive right.

If the claim be in conflict with the express or implied limitations of a grant or agreement between the dominant and servient owners.

If the servient owner is ignorant of the user.

If the servient owner, either from the nature of the user by the dominant tenement, or from the nature of the occupancy of the servient tenement, is incapable of resisting the user by reasonable means.*

Illustrations.

(*a.*) The servient tenement is leased for 19 years to a tenant by A, the owner, and after the termination of the lease he leases again for 3 years. During the first 20 years of that period the owner of the dominant tenement enjoys a user of the light passing unobstructed from the servient tenement. He is then obstructed by the tenant of the servient tenement. But during the first 19 years the landlord had no power to oppose the user. The prescriptive right is not acquired at common law.

(*b.*) A, the servient owner, though only occupying by a tenant, has, during a part of the term of the lease, notice of the user by the dominant owner.

At the termination of the lease he renews, granting a 20 years' lease, without requiring his tenant to resist the user. During the whole of the renewed term of 20 years the dominant tenement enjoys the user.

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* This still appears to me to be the right rule, notwithstanding the recent decision in *Angus* v. *Dalton*, App. Q. B. 48 L. J. C. L. 225. [This note was written in 1880, since which the Appellate Court has decided that by 20 years' uninterrupted enjoyment the easement of support of buildings by land may be acquired under the Prescription Act, if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. The common law rule, however, above given, seems to have been recognised in the opinions of the judges, though some of them thought that the right to support of buildings by land existed independently of the possibility of interruption. The Appellate Court's decision is reported in 6 App. Ca. 740, H. L.; 50 L. J. Q. B. 689 and 30 W. R. 191, H. L.]

The owner of the dominant tenement may claim a prescriptive right.

(*c.*) A is the owner of soil subjacent to land of B, which A's soil supports.

A excavates the subjacent soil for 20 years without leaving any support, and claims to have acquired a prescriptive right so to excavate; but he cannot acquire the right, inasmuch as A had not done any act in the soil of B, and B had no means of preventing A from excavating in any manner he pleased.[1]

(*d.*) A is the owner of a mine, from which he has pumped the water during 20 years for facilitating the excavation of its minerals. The water which, as it issued from the mine, formed a stream, was used for 20 years by B for his mill. A, not finding it necessary any longer to pump out the water, ceases to do so, and the stream is no longer supplied. B claims to have the stream continued.

During the 20 years of B's user, A could only have resisted the user by getting rid of the water in a different way, which would have entailed considerable expense. As A has not had reasonable means during the 20 years of resisting the user, B cannot claim a right by prescription to the continuance of the supply.[2]

(*e.*) A claims a right of support to his building from the contiguous building of B, and founds a claim to damages on this right by reason of B having removed his building, and thus endamaged A's building. Such a right cannot be allowed, because it cannot have existed immemorially, and because it cannot have been openly acquired, and there was therefore no opportunity for resistance.[3]

No easement of light can be claimed except as appurtenant to buildings.

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[1] *Blackett* v. *Bradly*, 1 B. & S. 940; 31 L. J. Q. B. 65.

[2] *Arkwright* v. *Gell*, 5 M. & W. 203; 8 L. J. N. S. Exch. 201.

[3] *Solomon* v. *Vintners' Co.*, 4 H. & N. 585; 28 L. J. Exch. 370. This case, however, is no longer law if *Lemaitre* v. *Davis* is accepted, q. v. p. 47, since the Prescription Act admits of the acquisition of those easements only which might have been acquired at common law.

Illustration.

A has a timber yard and saw-pit, and has been in the enjoyment of the light passing laterally over B's ground to his saw-pit for more than 20 years. B then builds and obstructs the light. A cannot claim a right of easement to have the obstruction removed.[1]

In regard to water an easement cannot be acquired by prescription at common law to streams not flowing in defined courses, and to collections of water that are not permanent.[2]

The character of the enjoyment to enure as a prescriptive right must be throughout that of an easement. Therefore, if during a part of the enjoyment on which the claim depends there has been unity of ownership of the two tenements vested in the person claiming as dominant owner or in his assignors, the continuity of enjoyment required in the character of an easement is destroyed.

The suspension of user temporarily by agreement, or the substitution temporarily of another user for the particular one exercised, is not an interruption.[3]

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[1] *Roberts* v. *Macord*, 1 Moo. & Rob. 230.
Potts v. *Smith*, L. R. 6 Eq. 311; 38 L. J. Ch. 58.

[2] *Rawstron* v. *Taylor*, 11 Exch. 369; 25 L. T. 33.

[3] *Payne* v. *Sheddon*, 1 Moo. & Rob. 382.
Lovell v. *Smith*, 3 C. B. N. S. 120.
Reynolds v. *Edwards*, Willes, 282.
Davis v. *Morgan*, 4 B. & C. 8.

Illustrations.

A is using a way over B's close. B wishes to make a canal across the way and builds a bridge over it, by which A may then cross.

The use of the way is suspended by agreement for this purpose. This is not an interruption.

A uses a way over B's close. B wishes for a few days to place a tent over a portion of the way, and allots to A another way by which he may pass round the tent into the other portion of the way.

A makes use of this new path. This is not an interruption.

PRESCRIPTION UNDER THE PRESCRIPTION ACT.

No easement can be acquired under this Act unless the servient or dominant owner brings an action;[1] in which case, to enable the owner or occupier of the dominant tenement to claim the right to the easement, the enjoyment must be shown to have continued up to the commencement of the suit or action. (See sec. 4. Prescription Act.)

The easements which can be acquired by statutory prescription under the Prescription Act are such easements at common law as may be acquired by grant, prescription, or custom, to any way, *or other easement*,[2] or to any watercourse and use of water.

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[1] *Wright* v. *Williams*, 1 M. & W. 77; 5 L. J. N. S. Exch. 107. *Richards* v. *Fry*, 7 A. & E. 698; 7 L. J. N. S. K. B. 68.

[2] See in *Dalton* v. *Angus*, the observations of Selborne, Lord Chancellor, on the construction of this section, and especially of the words in *italics*, with reference to the opinion of Erle, C. J., in

The enjoyment on which the easement is claimed must have been without interruption.

Illustration.

Enjoyment of wind to a mill is not susceptible of interruption. Such a right, therefore, cannot be acquired as an easement under the Prescription Act.[1] (See sec. 2.)

The claim to an easement under the Prescription Act may be made in the name of the occupier or owner of the dominant tenement, but when the easement is acquired, it is acquired for the benefit of the dominant tenement, under a presumed grant to the owner of the fee.

A claim cannot be made under the Act unless the enjoyment has been actually had for at least 20 years.

Webb v. *Bird*, that the application of the section is confined to easements of ways and water. 6 App. Ca. 740, H. L.

[1] The right to support of buildings by land does not come under the category of easements which can be acquired under the Prescription Act, unless it be of a kind that is susceptible of interruption. In *Dalton* v. *Angus*, supra, the Lord Chancellor (Selborne) considered that such an easement was susceptible of interruption and could be so acquired. The only mode of effective interruption available is to weaken the foundations of the house by digging in the servient tenement close to those foundations. Would any court, after the peaceable enjoyment of support, say for 19 years, sanction an act which would destroy the property of a neighbour in order to defeat an enjoyment so long acquiesced in? If not, the enjoyment is practically not susceptible of interruption, and the right cannot be acquired under the Prescription Act.

A claim to an easement under an enjoyment extending to any period short of 40 years can only be made if the enjoyment has been had *as of right*[1] *and without interruption.*

Accidental interruptions to users are not such interruptions as are contemplated by the Act.[2]

Nothing is to be deemed to be an interruption unless the act of interruption has been submitted to or acquiesced in for one year. (Sec. 4.)

In order to negative submission it is not necessary that the party interrupted should have brought an action or suit, or taken any active steps to remove the obstruction: it is enough if he has communicated to the party causing the obstruction that he does not submit to or acquiesce in it.[3]

The right to the easement under such enjoyment cannot be defeated by merely showing that the right so enjoyed for 20 years was first enjoyed at a date prior to the period of 20 years, such date being more recent than the period in history to which legal memory is supposed to extend (viz., the first year of the reign of Richard I.).

[1] This is the meaning of the words "actually enjoyed by any person claiming right thereto." (See p. 27.)

[2] *Hall* v. *Swift*, 4 Bing. N. C. 381; 7 L. J. N. S. C. P. 209.

[3] *Glover* v. *Coleman*, L. R. 10 C. P. 108; 44 L. J. C. P. 66.

But the right to an easement (other than an easement of light) under the enjoyment of 20 years required by the Act, may be defeated in any other way in which an easement claimed by prescription at common law might be defeated before the Act. (Sec. 2.)

Illustration.

Richard I. ——— *b* *x* *a* *a*

a a = enjoyment for the full period of 20 years as of right and without interruption.

The claim in respect of '*a a*' cannot be defeated by showing that the enjoyment had its origin at any period (say *x* or *b*) more recent than the first year of the reign of Richard the First.

The claim may be defeated, as it might be at common law before the Act, by showing that the enjoyment was not submitted to, or that the easement was enjoyed secretly and without the knowledge of the owner of the servient tenement, or that the enjoyment was subject to interruption, and was on every occasion resumed by license of the owner of the servient tenement.

The claim may also be defeated if the easement is shown to have been enjoyed discontinuously.[1]

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[1] *Hollins* v. *Verney*, 11 Q. B. Div. 715; and observations of Baron Parke in *Lowe* v. *Carpenter*, 6 Exch. 825, referred to in it.

Illustration.

A, for the purpose of cutting timber in his wood, had used a road belonging to B 31 years before the action by B for trespass, and again 16 years before the action, and again in the year in which the action was brought. The right not having been exercised continuously, A's defence of actual enjoyment for 20 years as of right fails.

If the enjoyment has extended to a period of 40 years as of right and without interruption, the right to the easement becomes absolute, and may not be defeated by any such defences (sec. 2) unless the enjoyment has been had by agreement in writing.

Illustration.

A has had enjoyment as of right and without interruption for the full period of 40 years without any agreement in writing. His right to the easement is absolute.

In the case of a prescriptive right to light[1] the actual enjoyment of the access of light without interruption for 20 years gives an absolute right, unless the right is limited by agreement in writing. (Sec. 3.)

No presumption of enjoyment for the term of 20 years, or of 40 years, can be made from any shorter term of enjoyment shown to have been had.

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[1] *Tapling* v. *Jones*, 11 H. L. C. 290; 34 L. J. C. P. 342.

"The time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible." 7th section.

"When any land or water upon, over, or from which any such way or other 'convenient water-course' [error for 'easement or any water-course'] or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of 40 years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person

"entitled to any reversion expectant on the "determination thereof."* 8th section.

Illustrations to Sec. 4.

(*a.*) A brings a suit against B claiming an easement to a way over the tenement of B, in the exercise of A's right to which A alleges that he has been resisted by B.

B has brought no suit for trespass, but as A has brought this suit he may establish his right to the easement, if he can show that he has had enjoyment for the required term of 20 years next preceding the suit, without interruption submitted to or acquiesced in by A, for one year after A had notice of the act of interruption from B.[1]

(*b.*) In the same case B shows that the interruption was a period next preceding the suit, and argues that therefore the enjoyment does not satisfy the requirements of the Prescription Act, as the enjoyment must be next preceding the suit.

A, however, may recover in this case, provided that he has enjoyed without interruption for 19 years and one day, followed immediately by an interruption for a term of not more than 364 days immediately before the suit, since this interruption, being less than one year, is by section 4 not to be deemed an interruption, and the enjoyment has therefore been had for 20 years next preceding the suit.[2]

Illustrations to Sec. 7.

(*a.*) In the same circumstances B pleads and proves disability

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* The words "any person entitled to any reversion expectant "on the determination thereof" include a tenant at will to the owner of the reversion, according to the view taken by the Division Court in *Laird* v. *Briggs*, 16 Ch. Div. 440. The Appellate Court, however (19 Ch. Div. 22), declined to express an opinion on this point, and intimated that they must not be taken to agree with the construction so placed on sec. 8.

[1] *Wright* v. *Williams*, 1 M. & W. 77; 5 L. J. N. S. Exch. 107. *Richards* v. *Fry*, 7 A. & E. 698; 7 L. J. N. S. K. B. 68.

[2] *Flight* v. *Thomas*, 11 A. & E. 688; 10 L. J. Exch. 529; affirmed in H. L. 8 Cl. & F. 231.

in that he was an infant for 14 out of the 20 years next preceding the suit. A cannot recover.

(*b.*) In the same circumstances B pleads and proves that B's father was during two years out of the 20 years of enjoyment by A diligently prosecuting a suit against A for trespass, which suit abated on the death of B's father at the end of the two years, and during the period of B's infancy. A cannot recover.

(*c.*) A brings an action of trespass against B in regard to the use of a way over A's land. B claims an easement of way by user for more than 20 years next preceding the suit. A replies that a life estate for 5 years was interposed between the first 10 years and the last 5 years of enjoyment. But B shows that he has enjoyed for full 25 years preceding the suit, or, deducting the life estate, for 20 years, as required by the statute. A cannot recover.[1]

(*d.*) In a claim by A to the absolute right to an easement under an enjoyment of 40 years, B pleads and shows that he was an infant for 14 years of the period, and that for 2 years of the period preceding this period of infancy his father was diligently prosecuting a suit for trespass against A, which suit abated on the death of B's father at the end of the two years.

These periods are not to be deducted, and A can recover if he shows an enjoyment for the full period of 40 years next preceding the suit brought by him.

Illustrations to Sec. 8.

(*a.*) In a claim by A to the absolute right to an easement under an enjoyment of 40 years, B pleads and proves that the enjoyment of A was first for 20 years followed by a lease for 15 years, and after the determination of the lease by an enjoyment of 16 years next preceding the suit, and that within 3 years following the determination of the lease for 15 years he brought an action for trespass against A.

Here, although the entire period is 51 years, the term of the lease must be deducted, and the entire term of enjoyment is reduced to 36 years. A cannot recover.

(*b.*) In a claim by A to the absolute right to an easement

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[1] This was held to be the correct construction of the section in *Clayton* v. *Corby*, 2 Q. B. 813; 11 L. J. Q. B. 239.

under an enjoyment of 40 years, B pleads and proves that the enjoyment of A was first for 20 years, followed by a lease for 15 years, and after the determination of the lease by an enjoyment for 16 years next preceding the suit; but he fails to show that within 3 years following the determination of the lease he brought any action against A. The term of the lease therefore is not deducted from the period of enjoyment by A. A may recover.

An easement cannot be acquired under the Prescription Act if the circumstances are such that no interruption of the enjoyment by reasonable means is possible.

Illustrations.

(*a.*) A works mines under B's land without leaving any support to the surface land. A claims to have acquired a right by prescription so to work the mines as to leave no support to the surface land of B. As no act is done upon the surface which B can resist or interrupt, the right claimed cannot be gained.[1]

(*b.*) A has for more than 20 years continued to place cinders in heaps upon his land abutting on a stream; the cinders are at last carried down the stream and damage the mill of B. A defends the action by saying that he has acquired a prescriptive right so to place the cinders as to risk their being carried down and damaging B's mill.

As, however, B has had no power of resisting or interrupting the practice of placing cinders on the bank of the stream, A cannot maintain his claim to a prescriptive right, and his defence is not sustainable.[2]

(*c.*) B has a mine, and with a view to get rid of an obstacle to the working of the mine he makes a channel by which he drains the mineral area in which the ores lie. This channel and the flow of water through it are continued for the convenience

[1] *Blackett* v. *Bradley*, 1 B. & S. 940; 31 L. J. Q. B. 65.

[2] *Murgatroid* v. *Robinson*, 7 E. & B. 391; 26 L. J. Q. B. 233.

of the mining operations for many years, and A applies the stream after it issues from the mine to the purpose of turning his mill. He continues to do so for more than 20 years. At length, from the mineral ore above the level of the stream becoming exhausted, the flow of water through the channel ceases. A brings an action against B, claiming a prescriptive right to the continued flow of the stream.

B could not have interrupted the enjoyment of the stream by A except by going to enormous expense in providing for the water a different exit.

On this, among other grounds, therefore, A cannot maintain his claim to a prescriptive right.[1]

As a prescriptive right equally at common law and, except in the case of light, under the Act proceeds upon the presumption of a grant, and in all cases requires that the easement should have been enjoyed without interruption, thus pre-supposing a power of interruption and resistance,* an easement under a claim of 20 years' enjoyment cannot be acquired under the Prescription Act if at the commencement of the period of 20 years the servient owner was incapable of making a grant.

Illustrations.

(*a.*) A claims an easement of way over the land of B. B, prior to the date at which the enjoyment is said to have first commenced, had leased the land over which the way is claimed to C.

At the time, therefore, at which the enjoyment commenced,

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[1] *Arkwright* v. *Gell*, 5 M. & W. 203; & 8 L. J. N. S. Exch. 201.

* See as to this *Harbridge* v. *Warwick*, 3 Exch. 552; 18 L. J. Exch. 245. But see also *Simper* v. *Foley*, 2 Joh. & H. 555.

B had no power to make a grant of the right of way. No presumption of a grant to A can arise, and A has not acquired the easement claimed.

(*b.*) If, however, the enjoyment began before the lease, and was continued during its term and afterwards, a grant may be presumed and a prescriptive right under the Act may be acquired. (See *suprà*, secs. 7, 8.)

To enable a prescriptive right to be acquired under the 2nd section of the Act the easement must have been actually enjoyed by any person claiming right thereto.

These words "actually enjoyed by any person claiming right thereto" in sec. 2 of the Act have been held to mean "actually enjoyed as of right."[1] But even though shown to have been so enjoyed the claim, except in the case of light, is liable to be defeated by the common law defences mentioned in page 20.

Illustrations.

A conveys in 1864, under an agreement of 1855, a piece of land abutting on another piece of land, which B under the original agreement was to pave as a street. The further side of the intended street was bounded by a wall the property of A. From 1854 to 1881 some sheds built by B as workshops had stood in the intended street, with gables resting on the walls. A had in 1861 conveyed to C, the plaintiff, a property on the other side of the wall. In 1877, A had conveyed to B the site of the street. In 1881, C pulled down part of this wall, thus destroying B's shed. Held, that up to 1877 B's enjoyment was precarious, not as of right, but on sufferance, and that he had not enjoyed for twenty years as of right, as required by the section.[2]

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[1] *Tickle* v. *Brown*, 4 A. & E. 369.

[2] *Tone* v. *Preston*, 24 Ch. Div. 739; 49 L. T. 99; 32 W. R. 116.

A enjoys the convenience of a way over B's close, but takes care that B has no knowledge that he uses it.

A enjoys the convenience of a way over B's close, but is careful on each occasion to ask and obtain B's permission.

A has always been interrupted and resisted by B in the exercise of his alleged right of way over B's close.

In all these cases, though A may have actually enjoyed as of right, his claim is liable to be defeated under the section by any of these common law defences.

Of Easements of Water, Ways, Air, Support and Light.

Easements are abridgments of the natural rights in property, or in the use of unappropriated natural objects, as air and flowing water, which right of use may, for practical purposes, be classed as property.

Natural Rights of Owners of Land, in Water flowing by or through their Property.

NATURAL RIGHTS TO THE USE OF WATER.

There is no *property* in the water of a *natural* stream, except in the use of it in such reasonable quantity as is abstracted from it; and in that only so long as it is in possession.

The owner of an estate or property on the bank of a natural and defined stream flowing on the surface, or his agent or tenant, has a right to the reasonable use of the water of the stream, whether the use be in irrigation, in manufacturing purposes, or in other purposes of utility.

He has no inherent right as such owner, agent, or tenant to obstruct the water of the stream, or to transmit it, injured in quality, or (in regard to quantity) diminished beyond an extent consistent with a reasonable use.

What is a reasonable use is in every instance a question dependent for its solution on the circumstances of the case.[1]

A riparian proprietor's right extends only to the defined stream, and not to that portion of of the water which, though eventually by percolation or otherwise it may reach and supply the defined stream, does not as yet run in a defined stream.[2]

Mere diversion of water by an upper riparian proprietor above the boundary of the tenement of a riparian proprietor is not an injury to the right of the latter, if the water so diverted is returned to the stream before it reaches his tenement.[3]

The lower riparian proprietor may, however,

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[1] *Embrey* v. *Owen*, 6 Exch. 353; 20 L. J. Exch. 212.
Medway Navigation Company v. *the Earl of Romney*, 9 C. B. N. S. 575; 30 L. J. C. P. 236.
Swindon Waterworks Company v. *Wilts and Berks Canal Navigation Company*, L. R. 7 H. L. Cases, 697; 45 L. J. Exch. 638.

[2] *Broadbent* v. *Ramsbottom and another*, 11 Exch. 603; 35 L. J. Exch. 115.

[3] *Kenrick* v. *Great Eastern Ry. Co.*, 23 Ch. D. 566; 52 L. J. Q. B. 608.

be injured by a more than reasonable use of the water having been made after diversion or before return.[1]

NATURAL RIGHT TO ACCUSTOMED FLOW.

It is a natural right of every upper and every lower riparian proprietor to have the stream flow on in its accustomed course, unobstructed.[2]

Illustrations.

A, a lower riparian proprietor, dams up a stream flowing past B's grounds above to the grounds of A, and thereby diminishes the fall of water to which B is entitled from the accustomed flow of the stream; or,

B, an upper riparian proprietor, dams up the water as it passes his grounds, and so affects the flow of it to the grounds of A, a lower riparian proprietor. In each of these cases, the act of damming up the stream violates the natural right of B and A respectively to the accustomed and unobstructed flow of the stream.

A riparian owner cannot, except as against himself, grant a user of the water to one who is not a riparian proprietor, and any user by such person, whether under such grant or not, is wrongful if it sensibly affects the flow of water by the lands of riparian proprietors.

NATURAL RIGHT TO PURITY OF WATER.

A proprietor by or through whose property a stream flows has a right, independent of an

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[1] *Embrey* v. *Owen*, 6 Exch. 353; 20 L. J. Exch. 212.

[2] *Wright* v. *Howard*, 1 Sim. & St. 190; & 1 L. J. Ch. 94. *Sampson* v. *Hodinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148.

easement, to have the stream reach him in a condition of purity.[1]

It follows that a proprietor has no right to pollute a stream to the prejudice of one to whose property it flows, unless he has a right of easement so to pollute it.

This rule is equally applicable to all *natural*[2] streams, comprising

Defined or undefined surface streams;

Underground streams with known or defined courses; or,

Water percolating through the soil in unknown or undefined streams.[1]

* It is conceived that it is also applicable to all such *artificial*[3] streams.

The rules as to the RIGHT TO THE USE OF WATER AND TO ITS ACCUSTOMED FLOW apply also to such natural streams as flow in a known and defined course *below* the surface.

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[1] *Wood* v. *Waud*, 3 Exch. 748; 18 L. J. Exch. 305.

[2] *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J. Q. B. 231.

[3] *Whaley* v. *Laing*, 2 H. & N. 476; 26 L. J. Exch. 327; and on appeal 3 H. & N. 675; and 27 L. J. Exch. 422.

* This seems to follow from the broad character of the ruling in *Whaley* v. *Laing*, in which it was held that when a person is in possession of an artificial stream, although he has as yet acquired no right of easement in it, nor any prescriptive right to its uninterrupted flow, yet as against a person who, in the absence of a right of easement, pollutes it to his detriment, he is injured by the pollution, and may maintain an action for the injury.

They do not apply to *artificial* streams,[1] or to streams that do not flow on the surface, or in a known and defined course below the surface, but have their course in unknown and undefined channels.[2]

NATURAL RIGHT TO GET RID OF OR APPROPRIATE SURFACE WATER.

A person whose property is flooded without any negligence of his, or on which water has casually collected, is entitled to get rid of the water by letting it take its own course, or by draining it off.[3]

If he assists the subsidence of the water by cutting trenches or otherwise, he must do so in such a way as not to prejudice the rights of others.[4]

A landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a watercourse which it previously supplied.[5]

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[1] As to when a stream alleged to be partly artificial is to be deemed a natural stream, see *Roberts* v. *Richards*, 50 L. J. Ch. 297.

[2] *Drewett* v. *Sheard*, 7 C. & P. 465.
Chasemore v. *Richards*, 7 H. L. Cases, 349; & 29 L. J. Exch. 81.

[3] *Rawstron* v. *Taylor*, 11 Exch. 369.

[4] *Whalley* v. *Lancashire and Yorkshire Ry. Co.* See L. J. 1884., Notes of Cases, p. 46; Court of Appeal 29 March.

[5] *Broadbent* v. *Ramsbotham*, 11 Exch. 602; 25 L. J. Exch. 115.

OF EASEMENTS IN WATER BY GRANT AND BY PRESCRIPTIVE RIGHT.

Easements may be acquired in water in streams whether natural or artificial, and whether constant or intermittent in flow, and also in ponds, tanks and other collections of water which have no flow or no appreciable flow.

Easements may be acquired by *express* grant to water, whether flowing or not, and whether surface or percolating, and whether defined or undefined in course; but by prescription they may not be acquired over any streams but those having *defined* courses, nor over any collections of water but those which are permanent.[1]

Illustration.

There is a swamp on A's ground from which for more than 20 years water has percolated through the ground to a defined stream which it has thus supplied.

A may drain off the swamp; and B and others who claim a prescriptive right in the defined stream cannot claim that A should leave the swamp standing on his ground.[2]

He must, however, get rid of the water with due care, so as not to cause injury to others' property.[3]

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[1] *Gaved* v. *Martyn*, 19 C. B. N. S. 732.

[2] *Rawstron* v. *Taylor*, 11 Exch. 369; 25 L. J. 33.

[3] *Whalley* v. *Lancashire and Yorkshire Railway Co.*, Court of Appeal, 1884. See L. J. Notes of Cases, 46.

Where water has been conducted into a defined channel with a flow of a permanent character by artificial means, rights to the use of it may be acquired by grant or by prescription.[1] Whether the flow is of a permanent character is a question of fact.

The character of the stream may be permanent although intermittent: as a water-course dug to supply a mill with water; or whether intermittent or not it may want the character of permanency: as if a stream originates from the pumping of water from a mine.[2]

The right to the uninterrupted flow of water in a permanent artificial stream may be acquired both against the originator of the stream and any person over whose land the water flows.

If the artificial stream is of a temporary character, no right to the uninterrupted flow of it can be acquired against the originator.

Though the artificial stream is of a temporary character, and no right to the continuance of the flow can be acquired against the originator of it, yet while and so long as the water continues to be transmitted by the originator, such a right may be acquired by prescription against

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[1] *Powell* v. *Butler*, 5 Ir. R. C. L. 309, C. P.

[2] *Beeston* v. *Weate*, 5 E. & B. 986; 25 L. J. Q. B. 115.

those through whose land the water has been accustomed to flow.[1]

The following rights may be acquired as easements in natural and artificial streams.

THE RIGHT OF EASEMENT TO OBSTRUCT AND DIVERT WATER.

If a person, whether riparian owner or not, has obstructed or diverted, or obstructed and diverted the water of a defined natural or defined permanent artificial stream, whether continuously or at regularly recurring intervals, for the period and under the other conditions required for the acquisition of easements by prescription, he may thereby acquire an easement against riparian owners affected by his conduct.

Illustrations.

(*a.*) A has at particular times in the year for 20 years continuously, by a cut in the bank and small channel, diverted the water of the river to his tenement at a distance from the bank of the river, on one of the banks of which, below the cut, B is a riparian proprietor.

A may thus acquire a right by prescription to divert the stream.[2]

If the stream is artificial and *temporary*, A can acquire no such right by so acting.

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[1] *Arkwright* v. *Gell*, 5 M. & W. 203; 8 L. J. N. S. Exch. 201. *Gaved* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353. *Greatrex* v. *Hayward*, 8 Exch. 291; 22 L. J. Exch. 137.

[2] *Bealey* v. *Shaw*, 6 East, 209;
& *Wright* v. *Howard*, 1 Sim. & St. 190;
& 1 L. J. Chy. 94.

(*b.*) A has for 20 years obstructed and penned back a stream so as to prejudice an upper or lower riparian proprietor, or has for the same period caused the water to flow over the land of such proprietor. A may in these cases acquire a title by prescription to continue so to act.[1]

THE RIGHT OF EASEMENT TO POLLUTE WATER.

A right to pollute water, and to transmit it in a polluted condition, may be acquired by prescription. The time begins to run towards the acquisition of the right by prescription from the period at which the pollution becomes first perceptible, and prejudicially affects the servient estate.

A prescriptive right to foul a stream is only acquired after 20 years from the period at which the degree of pollution which is claimed commences to affect prejudicially the servient estate.[2]

EASEMENTS OF WAY.

Public rights of way are those which every

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[1] *Wright* v. *Howard*, 1 Sim. & St. 190; 1 L. J. Chy. 94.
Bealey v. *Shaw*, 6 East, 209.
Mason v. *Hill*, 3 B. & Ad. 304; 1 L. J. N. S. K. B. 107.
Stockport Water Works Co. v. *Potter*, 7 H. & N. 160; & 31 L. J. Exch. 9.
Holker v. *Porritt*, 8 L. R. Exch. 107; 42 L. J. Exch. 85; & L. R. 10 Exch. 59; 44 L. J. Exch. 52.

[2] *Goldsmid* v. *The Tonbridge Wells Improvement Commissioners*, L. R. 1 Chy. App. 349; & 35 L. J. Ch. 382.

member of the community enjoys of passing from one place to another by public passages and ways.

Public rights of way do not depend upon the situation of a tenement, and are not easements.

Private rights of way are abridgments of the natural right of an owner of landed property to exclude all persons from his property.

Private rights of way appertain to a person, or a body of persons, either for the purpose of passing generally, or for the purpose of passing to and from a particular tenement of which such person or persons may be possessed.

Such private rights of way as appertain to persons without reference to a tenement are not acquired for use of a tenement, and are not therefore easements.

An easement of way may be general, that is, usable for all purposes connected with passing to or from the dominant tenement; or limited to a particular mode of user. It may be limited to particular occasions, or hours, or times of the year.[1]

The terms of the grant itself, or (if the ease-

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[1] *Bradburn* v. *Morris*, L. R. 3 Ch. Div. 812, C. A. *Cowling* v. *Higginson*, 4 M. & W. 245; 7 L. J. N. S. Exch. 265. *Ballard* v. *Dyson*, 1 Taunton, 279.

ment or right is gained by prescription) the mode of user, during the prescriptive period, must determine whether it is limited or not, unless it is expressly agreed to the contrary.

The owner of a private easement of way can only enter upon that way at either extremity, and not at any intermediate point.[1]

Ways which are appurtenant to a tenement may be acquired by express grant, by implied grant, or by prescription.

Such a right may be acquired by express grant,

(*a.*) When the vendor of real property assigns a right enjoyed by him over the neighbouring tenement of a third person.

(*b.*) When the vendor of real property grants the vendee a right of way over a part of such portion of his property as the vendor retains.

A right of way appurtenant to a tenement can only be used for the purpose of passing and re-passing to and from the tenement.

Illustration.

A possesses a tenement near a highway, and has a private right of way over the land intervening between the highway and his tenement. He has also some land at a spot still further from the highway, where he is about to build a house. He conveys bricks and other materials for building his house by the private way, first to the tenement to which he possesses the right of way,

[1] *Woodyer* v. *Haddon*, 5 Taunton, 125, see at p. 132.

and afterwards thence to the spot at which he is about to build a house.

In an action brought for damages for unauthorized use of the way, it is a question upon these circumstances whether the way was used for the purposes of the dominant tenement.[1]

The use of a private right of way to reach a highway, between which and the dominant tenement it lies, is a use proper to the purpose of passing from the dominant tenement, whatever may be the ultimate purpose which the occupier has in reaching the highway.[2]

If a dominant tenement is divided between two or more persons, a right of way appurtenant thereto becomes appurtenant to each of the severed portions, provided that such distribution of the easement is not at variance with the actual or presumed grant, under which the right has been acquired.[3]

Except in the case of ways of necessity, conveniences of way which have been used between two portions of the same tenement will not, on severance of such tenements and sale of one portion of them, pass to the vendee as appur-

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[1] *Skull* v. *Glenister*, 16 C. B. N. S. 81; 33 L. J. C. P. 185. *Clifford* v. *Hoare*, L. R. 9 C. P. 362; & 43 L. J. C. P. 225.

[2] *Colchester* v. *Roberts*, 4 M. & W. 769; 8 L. J. N. S. Exch. 195.

[3] *Codling* v. *Johnson*, 9 B. & C. 933; 8 L. J. K. B. 68. *Bower* v. *Hill*, 2 Bing. N. C. 339; 5 L. J. N. S. C. P. 17.

tenant to the portion sold to him; unless it expressly appears that such rights of way as were previously enjoyed in connection with the reserved tenement were intended to be conveyed.

Illustration.

A sells to B a portion of his tenement, between which and the portion which he reserves a path passes to the back gate of the premises embracing the portion of the tenement sold to B.

B has a way to the front door of his tenement, and the way by the back gate is not a way of necessity.

There are no words in the conveyance expressing that rights of way previously enjoyed with the premises sold are intended to be conveyed. The way by the back gate does not pass.[1]

A way of necessity over the land of the vendor is implied when there is no other way to the tenement purchased except by passing

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[1] *Proctor* v. *Hodgson*, 10 Exch. 824; 24 L. J. Exch. 195.
Dodd v. *Burchell*, 31 L. J. Exch. 364; 1 H. & C. 113.
Pearson v. *Spencer*, 1 B. & S. 571.

NOTE.—As to what language has been held to convey conveniences used prior to the severance of tenements,

See *Whalley* v. *Thompson*, 1 B. & P. 371.
Barlow v. *Rhodes*, 2 L. J. N. S. Exch. 91.
Geogheghan v. *Fegan*, 6 Ir. R. C. L. 139, Exch.
Kay v. *Oxley*, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210.

NOTE.—In *Barkshire* v. *Grubb*, 18 Ch. Div. 616, the way appears to have been a way of necessity, and it is not apparent why a rectification of the conveyance was called for by the insertion of general words expressing that rights of way previously enjoyed were intended to be conveyed.

through the tenement of the vendor from which the tenement purchased is severed, or by trespassing on that of a stranger.

No grant can be implied of a way of necessity through the tenement of a stranger.

Illustration.

A sells B a site for the express purpose of building a house. B has no way to the site except over A's adjoining property. B has a way of necessity over A's property.[1]

When the land reserved by a grantor on severance of tenements is on all sides surrounded by the land granted, or is otherwise only capable of being reached over the land granted, a way of necessity over the land granted is impliedly reserved.[2]

When a right to a way of necessity arises in favour of grantor or grantee, he has a right to take the most convenient way.

Illustration.

"A had an acre of land which was in the middle and encom-
"passed with other of his lands, and enfeoffs B of that acre. B
"has a convenient way over the lands of the feoffer, and is not
"bound to use the same way that the feoffer uses," but may take any way convenient to the grantee.[3]

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[1] *Davies* v. *Sear*, L. R. 7 Eqy. 427; 38 L. J. Ch. 545.

[2] See *numerous cases*, page 217 Goddard, edition of 1877. But also see *Suffield* v. *Brown*, 33 L. J. Chy. 249.

[3] *Oldfield's Case—Noy's Reports*, 123.

The way once ascertained cannot be altered.[1]

Although ordinarily the owner of a private right of way is not authorized to deviate from the particular road used, in exercise of the right, even though it is out of repair, yet if the right of way is rendered incapable of exercise by the act of the grantor, he may take a different route over the grantor's ground.

Illustration.

A has a right of way for a horse and cart over B's ground. B contracts the width of the road and renders impracticable the exercise of A's right. A may take a different route over B's ground.[2]

A private right of way cannot be acquired over a public road already in existence on a date previous to the date at which, either by grant or by prescription, the private right would otherwise be acquired.

Illustration.

A uses a private way in the grounds of B for 18 years and 11 months, in such a manner that if he continued to do so for the full period required by the statute he might acquire a private right of way. But at the end of the 18 years 11 months a public right of way is acquired over the same ground. A cannot acquire the private right of way.

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[1] *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761; 4 L. T. N. S. 769.

[2] *Hawkins* v. *Carbines*, 27 L. J. Exch. 44.
Selby v. *Nettlefold*, 22 W. R. 142.

NATURAL RIGHTS IN AIR.

There is no natural right to the uninterrupted flow of air to a tenement from an adjoining tenement.

But the owner of every tenement has a right to receive vertically the air appertaining to the situation of the property.[1]

The owner has a right to the free enjoyment and use of such air as *comes* to him laterally or vertically.

Everyone has a natural right to claim that the air which passes his tenement shall not be polluted.

"Unpolluted air" means air of such a degree of purity that it is "not rendered incompatible with the physical comfort of human existence."[2]

The natural right to purity of air is qualified as below:

Operations actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of

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[1] *Aldred's Case*, 9 Coke, 58.
Walter v. *Selfe*, 4 De Gex & Sm. 315; & 20 L. J. Chy. 434.
Bamford v. *Turnley*, 3 B. & S. 66; 31 L. J. Q. B. 286.
St. Helen's Smelting Co. v. *Tipping*, 11 H. L. C. 642; 35 L. J. Q. B. 66.

[2] *Walter* v. *Selfe*, 4 De Gex & Sm. 315; & 20 L. J. Chy. 434.
Tipping v. *St. Helen's Smelting Co.*, L. R. 1 Chy. Ap. 66.

the town and the public at large, may lawfully be carried on if they do not pollute the air so as to cause material injury to property, or health, or comfort.

In determining whether the wrong is actionable, consideration must be had of the circumstances in which the annoyance is caused, and whether the discomfort and annoyance are trifling, or such as to interfere seriously with the ordinary comfort of human existence.[1]

A man cannot excuse his pollution of the atmosphere by the fact that it is more or less polluted by others.

RIGHTS OF EASEMENT IN AIR.

A right to the uninterrupted flow of air can be acquired as an easement by grant express or implied, but cannot be acquired by prescription,[2] unless, perhaps, by prescription at common law.

A right to pollute air may be acquired by grant or by prescription under the Prescription Act.[3]

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[1] *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 142.

[2] *Webb* v. *Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841; 30 L. J. Chy. C. P. 384; 31 L. J. C. P. 335.
Hall v. *Lichfield Brewery Co.*, 49 L. J. Ch. 655.

[3] *Elliotson* v. *Feetham*, 2 Scott, 174.
Flight v. *Thomas*, 2 P. & D. 531; 10 A. & E. 590.

SUPPORT.

Right to Support to Land or Buildings.

Every man having land adjoining or over that of another has a natural right to require the other to continue the support afforded by the soil of his land.

He is not entitled to more support for his soil than is necessary to prevent it, if unburdened with buildings, from falling in.[1]

But a grant of land for the purpose of building implies a grant of a right to support for such buildings as may be erected on it; and a subsequent purchaser of adjoining land from the grantor will be bound by the implied grant.[2]

The obligation is to abstain from interrupting the ordinary enjoyment of land. Excavation, therefore, may proceed to the fullest extent, so long as disturbance does not take place.

If it is clear that the right to support is being imperilled, the party liable to be injured may obtain an injunction against further excavation.[3]

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[1] *Humphries* v. *Brogdon*, 12 Q. B. 739; 20 L. J. Q. B. 10.
Wyatt v. *Harrison*, 3 B. & Ad. 871; 1 L. J. N. S. K. B. 237.
Hunt v. *Peake*, Joh. 705; 29 L. J. Chy. 785.
Smart v. *Morton*, 5 E. & B. 30; 24 L. J. Q. B. 261.
Harris v. *Ryding*, 5 M. & W. 60; 8 L. J. N. S. Exch. 181.
Rowbotham v. *Wilson*, 8 H. L. Cases, 348; 30 L. J. Q. B. 49.

[2] *Rigby* v. *Bennett*, 21 Ch. Div. 559, C. A.

[3] *Wakefield* v. *Duke of Buccleuch*, L. R. 4 Eq. 613; 36 L. J. Chy. 763.

The right and obligation continue the same though buildings have been erected; and an action therefore lies if the excavation of the adjacent or subjacent soil causes subsidence of land after buildings have been erected on it, provided that the excavation would have caused it to sink in the same manner had no buildings been erected.

The right of action dates from the period at which sensible damage is sustained.[1]

There is no right, independent of a right of easement by grant or prescription, to the support of *buildings* by the adjacent or subjacent soil.[2]

Two contiguous buildings built simultaneously must generally have been built with the intention that they should derive support from each other. In such cases a right to the support of one of them by the other will be acquired as an easement by implied grant or implied reservation on the grant of one of them by the owner of both.[3]

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[1] *Bonomi* v. *Backhouse*, 9 H. L. Cases, 503; 34 L. J. Q. B. 181.

[2] *Rogers* v. *Taylor*, 2 H. & N. 828; 27 L. J. Exch. 173.
Rejecting the opinions of Pollock, C. B., and Watson, B., and following that of Cockburn, C. J.
See also the recent case of *Dalton* v. *Angus*, 6 App. Ca. 740; 50 L. J. Q. B. 689; 30 W. R. 191.

[3] *Richards* v. *Rose*, 9 Exch. 218; 23 L. J. Exch. 3.
Rigby v. *Bennett*, 21 Ch. Div. 559, C. A.

Where ancient buildings belonging to different owners have been built contiguously, there is a right of support from the building as well as from the land, and this right of support can be claimed under the Prescription Act.[1]

Even where the circumstances are such that the right to support of one of two such buildings by the other does not exist, if one is being removed, the owner is bound to use due care to prevent damage to the other by the act of removal.[2]

One who has contributed to the subsidence of his own land by excavation of the subjacent or adjacent soil, or by burdening the soil with buildings, has not on that account a right to claim a degree of support greater than he had before he did so from the person on whom the obligation lies not to remove the support afforded by his land.

NATURAL RIGHTS TO LIGHT.

Everyone has a natural right to receive vertically the light appertaining to the situation of his tenement.[3]

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[1] *Lemaitre* v *Davis*, 19 Ch. Div. 281; 51 L. J. Ch. 173.
[2] *Chadwick* v. *Trower*, 6 Bing. N. C. 1; 8 L. J. N. S. Exch. 286.
[3] *Corbett* v. *Hill*, L. R. 9 Eq. 671; 39 L. J. Chy. 547.

A person has no natural right to the light laterally appertaining to the situation of his tenement, *i. e.*, he cannot rightfully prevent others from building near his property so as to obstruct or abridge the light so received.

Illustration.

A is owner of a house, some of the windows of which overlook a piece of ground belonging to B, a railway company, and used as a goods yard of B's railway station. A's house has been built 16 years and A has enjoyed the light through its windows during that period. B now puts up a screen to obstruct the further enjoyment of the light by A. A cannot restrain B from doing so, because he has not acquired an easement of light.[1]

RIGHTS OF EASEMENT IN LIGHT BY IMPLIED GRANT.

Easements of light by implied grant arise on severance of tenements in the same way as other easements, when the intention is implied of granting an easement together with the property which is the subject of express grant.

Illustrations.

A sells B a house with windows overlooking A's grounds adjoining. A has impliedly granted to B an easement of light over his grounds to those windows;[2] because this is a continuous and apparent easement, used during unity and required for the use of the tenement conveyed.

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[1] *Bonner* v. *Great Western Railway Co.*, 24 Ch. D. 1; 48 L. J. 619; 32 W. R. 190.

[2] *Coutts* v. *Gorham*, Moo. & Mal. 396.
Palmer v. *Paul*, 2 L. J. Ch. 154.

A testator, A, dies leaving two sons, B and C. His trustees, in accordance with his will, executed two separate but contemporaneous conveyances, whereby they conveyed to B a piece of the testator's land with two dwelling houses on it, and to C another adjoining piece of land with a warehouse at the further end of it. Each parcel was sold "together with all lights thereunto belonging." C's successor in title was restrained from building on his land so as to obstruct his neighbour's lights.[1]

EXTENT OF USER OF EASEMENTS.

If a right has been granted by deed the extent of the right is determined by a construction of the deed.

Illustration.

A leases to B, granting B rights of drainage through A's adjoining property, but stipulates against the enlargement of the buildings without A's permission. B purchases the reversion, and the conveyance contains a similar right of drainage to that contained in the lease. B subsequently enlarges his buildings. The right of drainage having had reference to the house in the state in which it was before the enlargement cannot be extended so as to embrace the whole of the drainage of the enlarged structure.[2]

If an easement is granted for general purposes it cannot be restricted to particular purposes, so long as the purposes for which it is used do not impose a greater burden on the

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[1] *Allen* v. *Taylor*, 16 Ch. D. 355; 50 L. J. Ch. 178.

[2] *Wood* v. *Saunders*, L. R. 10 Chy. 582; 44 L. J. Chy. 514. See also *Finlinson* v. *Porter*, L. R. 10 Q. B. 188; 44 L. J. Q. B. 56. *United Land Co.* v. *Great Eastern Ry. Co.*, 10 L. R. Chy. 586; 44 L. J. Chy. 685. *Collins* v. *Slade*, 23 W. R. 199, V.-C. B.

servient tenement than what was contemplated at the time of the grant.

If a grant is wholly at variance with an Act of Parliament it is void. If only partly so it is good so far as it is not opposed to the Act.

Illustration.

'A,' a corporation, is empowered by Act of Parliament to make a water-course for certain purposes. After making the water-course it grants away a certain portion of the water for other purposes. The grant may be good to the extent of the water remaining available after fulfilment of the purposes for which the corporation was formed by the Act.[1]

When a dominant owner possessing an easement in respect of his tenement severs that tenement, reserving a portion for himself and selling a portion to a person, or several divided portions to several persons, there may arise the question whether the vendee, or all the vendees, severally take with their several purchases of the severed portion or portions of the tenement, any right in the easement proportional or otherwise to the extent of the purchase.

To determine this it is necessary to see whether, by allowing the easement to be so distributed among the vendor and the several vendees, any greater burden would be imposed on the servient tenement than that which may

[1] *Attorney-General* v. *The Corporation of Plymouth*, 9 Beav. 67; 15 L. J. Chy. 109.

have been granted or may be presumed to have been granted.[1] If a greater burden would be imposed upon the servient tenement by the distribution it will not be allowed.

Illustrations.

(*a.*) A has a large building with a right of way by easement (not being a way of necessity) appurtenant to it over B's land. A parcels his building out into 100 portions and sells them to 99 persons, reserving one to himself.

The right of way is not conveyed to the 99 vendees, because to permit this would be to permit a hundred people to pass by the way in place of one, which must necessarily increase the inconvenience to the servient tenement and impose on it a greater burden than may be presumed to have been granted.

(*b.*) In the same case A has an easement of light over B's ground. The right is a right to have the light pass unobstructed from the ground of B to 100 front windows in A's house. On sale of 99 portions of the house by A to 99 vendees, each portion containing a front window, a right to light to the windows of his purchased portion passes to each vendee, because this does not impose on the tenement of B any greater burden than before existed.

The obligation of a servient owner in respect of a right of way is that he shall not unreasonably contract the width of the road or render the exercise of the right of passing less easy than it was at the time of the grant.[2]

On the other hand, the dominant owner is

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[1] *Codling* v. *Johnson*, 9 B. & C. 933; 8 L. J. K. B. 68. *Bower* v. *Hill*, 2 Bing. N. C. 339; 5 L. J. N. S. C. P. 77.

[2] *Hawkins* v. *Carbines*, 27 L. J. Exch. 44.

under an obligation not to enlarge the use exercised under his right.

If a right has been acquired by prescription, the extent of it must be determined by the accustomed user. The accustomed user is limited to the extent of the user at the commencement of the period of user which, when completed, gives a prescriptive right.[1]

The measure of the degree to which the right to pollute a stream is acquired is the degree of pollution arising from the user as it existed at the commencement of the period of prescription. A subsequent enlargement of the user had at the commencement of the period does not avail to enlarge the right.

Illustrations.

(*a.*) A transmits dirty water to the premises of B. He has acquired a right by user of 20 years' duration to transmit clear water. The extent of his right is to transmit clear water.

(*b.*) A has acquired a right to transmit water in a certain degree of pollution to B's premises. He may not send water of a higher degree of pollution than he has acquired a right to send.

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[1] *United Land Co.* v. *Great Eastern Railway Co.*, L. R. 10 Ch. 586; 44 L. J. Ch. 685.
Wimbledon & Putney Commons' Conservators v. *Dixon*, L. R. 10 Chy. Div. 362; 45 L. J. Chy. Div. 353.
Bradburn v. *Morris*, L. R. 3 Chy. Div. 812, C. A.
Crossley & Sons, Limited v. *Lightowler*, L. R. 2 Ch. Ap. 478; 36 L. J. Chy. 584.

(c.) A, having previously acquired a right to foul a stream, set up new factories in the place of those to which the right was attached, and thus materially increased the degree in which the water was fouled. The subsequent increase in the fouling of the water might, if it were continued long enough, give rise to a new prescriptive right to foul it to that extent, but the right previously acquired is not thereby extended.[1]

If, from the extent of user having been gradually and imperceptibly increasing, it is impossible to measure definitely the extent of the user at the period of its commencement, no easement can be acquired.[2]

An easement of light is not considered to be altered in its use so as to increase improperly the burden on the servient tenement if the alteration to the windows or other aperture through which light is received involves no extension of the boundaries of the aperture, but is solely confined to improved modes of transmitting the light by alterations within the boundaries of the aperture.[3]

Illustrations.

(a.) A had two ancient windows made with small casements in leaden lattices which only opened partially. He removed the casements and inserted plate glass in light frames, and made the windows open wide.

This is not an excessive exercise of the easement.[3]

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[1] *Crossley* v. *Lightowler*, L. R. 2 Ch. Ap. 478; 36 L. J. Chy. 584.

[2] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners*, L. R. 1 Chy. Ap. 349; 35 L. J. Ch. 382.

[3] *Turner* v. *Spooner*, 1 Dr. & Sm. 467; 30 L. J. Chy. 801.

(*b.*) A sells B a house with windows overlooking A's grounds. A has impliedly granted an easement of light over his grounds to those windows. B, after purchase, materially alters the windows by enlargement, and also opens new windows.

A may build so as to obstruct the light to the new windows, and may also build so as to obstruct the light to the enlargements of the old windows, if he can do so without obstructing the light which B is entitled to receive through the former extent of the enlarged windows.[1]

A servient owner has a right to obstruct the enjoyment of an easement where that enjoyment is in excess of the right of the owner of the dominant tenement. He may obstruct it to the extent which is necessary to enable him effectually to prevent the excessive enjoyment, but no further.

Illustration.

A has a right of easement to send clean water through B's drain. He sends dirty water. Here B cannot obstruct the enjoyment by A of his easement in excess of his rights without stopping the water entirely. He is therefore entitled to do so.

Explanation. — By excessive enjoyment is meant enjoyment which imposes a greater burden upon the servient tenement than is authorized by the express or implied grant.

Illustration.

A has by 20 years' enjoyment acquired an easement to the use of light to his tenement through several ancient windows. The

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[1] *Blanchard* v. *Bridges*, 4 A. & E. 176; 5 L. J. N. S. K. B. 78.
Chandler v. *Thompson*, 3 Campb. 80.
Tapling v. *Jones*, 11 H. L. C. 290; 34 L. J. C. P. 342.

light passes over the open land of B, and B has been hitherto bound not to build so as to obstruct the light passing to the windows. A afterwards enlarges his windows. Here A does not by his act impose any further burden upon the servient tenement of B, because his act does not lay B under any increased obligation to abstain from building opposite the ancient windows. A's act, therefore, does not give him any enjoyment of his easement in excess of what he had before, and B, though he may not be able to obstruct the enlargements of the windows without also obstructing that portion of them which comprises the ancient windows, is still bound as before to abstain from so building as to obstruct the flow of light to the ancient windows.[1]

A servient owner can only obstruct the right of easement on his own ground. If it is impossible to obstruct the excessive exercise of the right without going on to the premises of the dominant owner he must obtain redress by legal proceedings.

OF THE INCIDENTS OF EASEMENTS.

In the absence of express stipulation in the instrument, if any, creating the easement, no

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[1] *Tapling* v. *Jones*, 34 L. J. C. P. 342; 11 H. L. C. 290.

NOTE.—I venture to think that all the other cases in which difficulties have arisen since the lucid decision in *Tapling* v. *Jones* may be solved by the above view of the exact nature of the easement of light.

The case of *Fowler* v. *Walker*, 51 L. J. Ch. 443, C. A. (affirming 49 L. J. Ch. 598), is not in conflict with *Tapling* v. *Jones*, as in *Fowler* v. *Walker* (in which the facts were that three old cottages with some small windows had been pulled down and a large warehouse with three large windows had been built on their site) reliable evidence was wanting as to the position of the windows in the cottages, and the extent of the easement of light could not be established.

obligation to repair that by which the enjoyment of the easement is held lies on the servient tenement.

Illustrations.

The owner of the highway (Stockport and Hyde Highway Board) has acquired a right of support to the highway by a wall belonging to B. If the wall is out of repair B is not bound to repair it. The owner of the highway is.[1]

A having an easement of private way has no right to leave it and take another on account of the want of repair. He has a right to repair it himself, but there is no obligation on the owner of the servient tenement to repair it.*

If the enjoyment of the easement is had by means of artificial works, the owner of the dominant tenement is liable for damage to the servient tenement arising from their non-repair. When the easement is independent of artificial works, and the injury to the servient tenement arises from natural causes only, no such liability accrues.

In what is necessary for the enjoyment of the easement the owner of the dominant tenement may do everything that is required for the full and free exercise of his right.

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[1] *Stockport and Hyde Highway Board* v. *Grant*, 51 L. J. Q. B. 357; 46 L. T. 388.

* Blackstone mistakenly lays it down that the owner of the dominant tenement having a right of private way may abandon it for want of repair and take another.

Illustration.

A has a right to an uninterrupted flow of water through the land of B by means of pipes. This right carries with it the right to enter upon B's land for the purpose of cleaning and repairing and otherwise preserving the pipes.[1]

OF THE EXTINGUISHMENT OF EASEMENTS.

Some of the modes by which easements may be lost correspond with those already laid down for their acquisition.

Corresponding to	
the express grant,	is the express renunciation, or where the grant was for a particular purpose, the cessation of the purpose;
the disposition by the owner of two tenements,	,, the merger by union of them;
the easement of necessity,	,, the cessation of the necessity;
the acquisition by prescription,	,, the abandonment by non-user.

A private right of way is not extinguished by the acquisition by the public of a public right of way over the same ground.

Illustration.

A has already acquired a private right of way. A public right of way is afterwards acquired over the same ground. The private right is not extinguished.

Although a private right of way is not extinguished by the acquisition by the public of a

[1] *Goodhart* v. *Hyett*, 53 L. J. N. S. Ch. D. 219; 32 W. R. 165.

public right of way over the same ground, it may be a question, in every case of the kind, whether the dominant owner has not abandoned his private right of way.[1]

The question whether, in such a case, the private right of way still exists or not, is of importance only in regard to the remedies for injury to the right.

An action will not lie by an individual for damages for injury to him in his right, as one of the public, to use a public right of way, unless he has sustained special damage.

The ordinary remedy is by indictment; whereas an action lies by anyone injured in his right to use a *private* right of way without any special damage.

Extinguishment by Express Release.

This must be under seal to be effectual. Acts of Parliament by which easements are destroyed, as, for instance, the General Inclosure Act, 41 Geo. III. c. 109, s. 8, have the operation of express releases.

Extinguishment by Merger.

By union of the two tenements in one owner, the special kind of property which an easement is becomes merged in the general rights of property.

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[1] *Regina* v. *Chorley*, 12 Q. B. 515.

Illustrations.

(*a.*) B has an easement of right of way (not being a way of necessity) over the tenement of A, which adjoins B's tenement. B purchases A's tenement and then sells it to C. The right of way which B possesses over the adjoining tenement becomes merged by the purchase by B of A's tenement, and unless B, in selling to C, reserves the right of way, he can no longer claim to exercise it.

(*b.*) B has an easement of right of way (not being a way of necessity) over the tenement of A, which adjoins B's tenement. A purchases B's tenement and then sells it to C. Here the right of way, having been merged in the general rights of property, cannot be claimed by C unless expressly granted.

(*c.*) B has an easement of right of way (not being a way of necessity) over the tenement of A, which adjoins B's tenement. B purchases A's tenement and then sells his own tenement to C. C, for the same reason as in illustrations (*a.*) and (*b.*), cannot claim the right of way.

Easements do not become and continue dormant or latent when two tenements are so united; nor are they *revived* on the subsequent severance of the tenements; but in the case of easements of necessity and other easements, of which a grant will be implied on severance of tenements, they arise newly with and consequent upon the severance.

Illustration.

In the above illustrations (*a.*), (*b.*) and (*c.*), if the way is a way of necessity, the easement becomes merged by the purchase, but arises again on severance of the tenements by the sale to C.

Rights attaching to a tenement by reason of its situation, generally termed "NATURAL RIGHTS," are never extinguished.

If obstructed for a time by the possession of an easement by some person other than the possessor of the natural right, they are only suspended, and are revived on extinction of the easement, either by unity of possession or otherwise.

Natural rights, in actual exercise by A as against B, can never be merged or lost by unity of possession of the two tenements in right of which the natural right is exercised.

Illustrations.

(*a.*) A, a riparian proprietor, dams up a stream and acquires an easement to obstruct the flow of water to B's tenement on the bank of the stream. Afterwards A buys B's tenement and thus extinguishes the easement. He then sells B's tenement to C. C has a natural right, or a right by vicinage, to the unobstructed flow of water.

(*b.*) A had a natural right to the flow of water of a stream on which B, higher up, but adjoining A's tenement, was also a riparian proprietor. A purchased B's tenement and then sold it to C. A, by the union of the two tenements, did not lose his natural right to the unobstructed flow of water.[1]

(*c.*) Two closes, x and y, adjoin. The owner of x is, by prescription, bound to fence his close. The owner of y purchases x. The obligation to fence is thus extinguished. He dies leaving two daughters, to whom the property goes. They make a partition, the one taking the one close, the other, the other. The obligation to fence is not revived, because the right to have a neighbouring close fenced off is not a natural right, but an easement.[2]

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[1] *Sury* v. *Pigott*, Popham's Reports, 166.
(See also in Tudor's L. C. on the Law of Real Property.)

[2] Dictum in *Sury* v. *Pigott*, approved in *Wood* v. *Waud*.

Exception.—Easements are not merged by union of the two tenements in one owner, if the two tenements are estates which are not co-extensive: as a tenement in fee and one for life. But the right of easement is in such case suspended.[1]

Extinguishment by Cessation of Purpose.

If an easement has been granted for a particular purpose, or has arisen out of the enjoyment of a right for a purpose which no longer exists, the easement ceases.

Illustration.

A canal company formed by Act of Parliament has a right to a water-course granted to it by another company for the supply of the canal. Afterwards the canal company is reconstituted by Act of Parliament as a railway company, and they then sell to A their canal property, including their water right. The canal company having ceased to exist, their water right has also ceased, and A cannot claim to exercise it.[2]

Extinguishment by Cessation of Necessity.

Easements of necessity cease when the necessity itself ceases.

Illustration.

A has a way of necessity over C's close. Subsequently A purchases adjoining property through which he has access to his own close.

A's way of necessity over C's close ceases.[3]

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[1] *James* v. *Plant*, 4 A. & E. 749; 6 L. J. N. S. Exch. Cham. 260.

[2] *National Guaranteed Manure Co.* v. *Donald*, 4 H. & N. 8; 28 L. J. Exch. 185.

[3] *Holmes* v. *Goring*, 2 Bingham, 76; 2 L. J. C. P. 134.

Extinguishment by Alteration of Mode of Enjoyment.

Except in the case of easements of light acquired by prescription, if the owner of the dominant tenement alters, to the prejudice of the servient tenement, the purpose or mode of enjoyment with reference to which the easement was expressly or impliedly granted, the easement is extinguished.

Illustrations.

(*a.*) A right of way is granted for the purpose of being used as a way to a cottage.

The cottage is changed into a tanyard. The right of way ceases.[1]

(*b.*) A has a right that the water of his roof shall drip from the eaves of his house into his neighbour's yard. The right is not lost by reason of his raising the height of his house so that the drops have a greater distance to fall, unless this alteration is found to be prejudicial to the servient tenement.

Extinguishment by Necessary Consequence of Act by Dominant Owner.

When the dominant owner authorizes an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is to prevent his future enjoyment of

[1] Illustration given by Baron Parke in *Henning* v. *Burnet*, 8 Exch. 187; 22 L. J. Exch. 79.

the easement, and the permission is acted upon, the easement is thereby extinguished.[1]

Extinguishment by Abandonment.

Easements may be extinguished by abandonment. Whether an easement has been abandoned or not may be determined from the circumstances of the case.

Illustration.

A had some ancient windows. He pulled down the wall in which they were and built it up blank. It continued thus for 17 years. Then B built up a wall opposite to it, and after three years A opened a window in his wall, and brought an action against B for obstructing his light.

The alteration made by A in pulling down his wall and building it up blank was of such a character that it was open to the Court to determine that he had abandoned his right of easement.[2]

The easement of light consists in the right to require the servient owner to abstain from making, on his own tenement, any obstruction to the passage of light to the ancient windows or other means by which light is communicated from the direction of the servient tenement to

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[1] *Liggins* v. *Inge*, 7 Bingham, 682; 9 L. J. C. P. 202.

[2] *Moore* v. *Rawson*, 3 B. & C. 332.

Note.—Greater difficulties may arise in the case of what may be called easements of abstention (generally called negative easements), in determining whether abandonment has taken place; but it is in all cases simply a question on the facts whether the right has been abandoned.

the dominant tenement. Such an easement arises by implied covenant to abstain from obstructing light.

The rule, however, as to *extinction* is the same as in the case of easements which consist of a right to require the servient owner to submit to the dominant owner doing an act on the servient tenement, viz., that the easement is extinguished on the cesser of use, coupled with any act clearly indicative of an intention to abandon the right. (See Illustration, *suprà*.)

Alteration in the mode of enjoyment, as has been intimated (p. 62), does not, in the case of easements of light acquired by prescription, even when such alteration is prejudicial to the servient owner (see *Tapling* v. *Jones*), work an extinguishment of the easement.

Illustration.

A has three cottages containing ancient lights. He pulls them down, and erects a large warehouse with large windows. In afterwards suing for a remedy against the servient owners for building so as to block the light coming to his ancient windows, he is unable to offer trustworthy evidence as to the exact position of the ancient windows with reference to the new windows, and cannot maintain his easement as to the new building.[1] Here there was no *extinguishment* of the easement, but the alteration had rendered it impossible to prove it.

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[1] *Fowler* v. *Walker*, 51 L. J. Ch. 443, C. A., affirming 49 L. J. Ch. 598.

If a person having an easement of light does any act which induces the owner of the servient tenement to entertain a reasonable belief that the owner of the dominant tenement has abandoned his easement of light, and the owner of the servient tenement in consequence incurs expense in building in such a manner as tends to obstruct the passage of light to the dominant tenement, the owner of the dominant tenement is estopped from saying that he has not abandoned his easement, unless he is willing to make a fair compensation to the owner of the servient tenement for the expense incurred.

Illustration.

A has a warehouse with ancient windows guarded by iron bars. He blocks up the windows with rubble and plaster, but leaves the bars outside.

The windows are so left for 19 years. The owner, B, of the servient tenement then builds so as to obstruct the passage of light to the dominant tenement. Even though A is not found to have intended to abandon his right to light, yet if his act has been such as to induce in B a reasonable belief that he had done so, and has led B to incur expense, he is estopped from saying that he had not abandoned his right, unless he compensates B for the expense incurred.[1]

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[1] *Stokoe* v. *Singers*, 8 E. & B. 31; 26 L. J. Q. B. 257.

NOTE.—This rule belongs more properly to the law of estoppel, which is not part of the law of easements. But in drawing out digests of different parts of the law, and until the whole law is so dealt with, it will be found that portions here and there must overlap. See as to this rule of estoppel *Cornish* v. *Abingdon*, which is in advance of *Pickard* v. *Sears*, inasmuch as

As to discontinuous or intermittent easements, if there is direct evidence of an intention to abandon the right, it may be shown to be abandoned after any the *shortest* period of non-user. But if the evidence is of an indirect character, non-user for twenty years is requisite to prove abandonment.[1]

OF THE DISTURBANCE OF RIGHTS ARISING BY SITUATION AND OF RIGHTS OF EASEMENT.

The rights to transmit *impure* air,
impure water,
disagreeable noises,
into the neighbouring property are rights which can only be acquired by grant, express or im-

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the rule in that case required that the party estopped should be found to have *intended to make the other party believe and act on the belief.* In *Cornish* v. *Abingdon*, 4 Hurl. & N. 549; 28 L. J. Exch. 262, it was held to be sufficient to show that the party estopped had, by his *negligent conduct*, though without intention, deceived the other into a belief on which he acted so as to change his situation.

[1] *Doe* v. *Hilder*, 2 B. & A. 791.
Moore v. *Rawson*, 3 B. & C. 332.
Holmes v. *Buckley*, 1 Eq. Cas. Abr. 27.
Payne v. *Shedden*, 1 Moo. & Rob. 382.
The Queen v. *Chorley*, 12 Q. B. 515.
Ward v. *Ward*, 7 Exch. 838; 21 L. J. Exch. 334.
Lovell v. *Smith*, 3 C. B. N. S. 120.
Hall v. *Swift*, 6 Scott, 167; 4 Bingh. N. C. 381; 7 L. J. N. S. C. P. 209.
Norbury v. *Meade & others*, 3 Bligh, 241.

plied, or by prescription, and are therefore easements if appurtenant to a tenement and existing for the convenience of that tenement, and in other respects satisfying the conditions of an easement.

Acts in assertion of such rights are in their inception invasions of the natural rights of property arising out of situation, and are termed nuisances, if they interfere sensibly with the ordinary comfort of human existence.

Illustration.

A, engaged in the sale of lace, settles in the neighbourhood of a brewery which has been carried on for 10 years. A's goods become damaged by the atmosphere of the brewery. A's natural right to purity of air has been invaded.[1]

To erect or place,[2] or continue[3] anything offensive so near the property of another as to

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[1] *Robins* v. *A brewer*, Viner's Abr. Nusans. (Mc.)
Elliotson v. *Feetham & another*, 2 Bingh. N. C. 134.
Bliss v. *Hall*, 4 Bingh. N. C. 183; 7 L. J. N. S. C. P. 122.

[2] In *Jones* v. *Powel* (Hutton, 136) a case is cited of an action brought against a dyer *Quia fumos, fœditates, et alia sordida juxta parietes querentis posuit, per quod parietes putridæ devenerunt, et ob metum infectionis per horridum vaporem, &c., ibidem morari non audebat.* And see *Ballard* v. *Tomlinson* (L. T. 23 February, 1884), which should apparently be determined on the same principle.

[3] *Penruddock's Case*, 5 Rep. 101.
Some v. *Barwish*, Cro. Jac. 231.
Saxby v. *The Manchester, Sheffield and Lincolnshire Ry. Co.*, L. R. 4 C. P. 198; 38 L. J. C. P. 153.
See especially the judgment of Keating, J.

render it useless for its purpose and, if a house, unfit for habitation, or in any other way to obstruct the exercise of a natural right arising by situation, is a nuisance and actionable.[1]

In every instance it is a question of fact whether such a degree of annoyance exists as can be said to interfere sensibly with the ordinary comfort of human existence.

No suitability of place can legalise a nuisance.*[2]

A nuisance is not justified by the existence of

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[1] See *Wright* v. *Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94, and *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148.

* NOTE.—In Comyns' Digest, "Action for Nuisance," it is said "an action doth not lie for the reasonable use of my *right*, "though it be to the annoyance of another; as if a butcher, "brewer, &c., use his trade in a convenient place, though it be "to the annoyance of his neighbour."

No authority is cited for this proposition. *Vide* judgment of Martin, B., in *Stockport Waterworks Company* v. *Potter*, 31 L. J. Exch. 9. In *Hole* v. *Barlow*, 4 C. B. N. S. 334, the questions left to the jury were, was the place where the bricks were burnt a proper and convenient place for the purpose? and if not, was the nuisance such as to make the enjoyment of life and property uncomfortable? and the jury found for the defendant; in effect finding (as Baron Martin subsequently said) that there had been no nuisance. But the doctrine of "a proper and convenient place" was overruled in *Bamford* v. *Turnley*, 31 L. J. Q. B. Exch. Ch. 286.

[2] *Bliss* v. *Hall*, 4 Bing. N. C. 183; 7 L. J. N. S. C. P. 122.
Elliotson v. *Feetham*, 2 Bing. N. C. 134.
Walter v. *Self*, 4 De Gex & Sm. 315; 20 L. J. Chy. 433.
Soltau v. *De Held*, 2 Simons, N. S. 133.
Bamford v. *Turnley*, 3 B. & S. 66; 31 L. J. Q. B. 286.

other nuisances of a similar character, if it can be shown that the inconvenience is increased by the nuisance for which redress is sought.[1]

An obstruction or disturbance of an easement is conduct which deprives or tends to deprive the possessor of the right of the lawful enjoyment of it.

Illustration.

A has an easement over B's ground of having water carried in pipes to A's adjoining tenement. B builds over the pipes and prevents A having access to them to repair them when out of order. B has disturbed and obstructed A in the enjoyment of his easement.[2]

An obstruction or disturbance of a right arising by situation or of a right of easement is actionable without its being necessary to show special damage.

An obstruction or disturbance includes a continuance of an obstruction or disturbance.

It is immaterial whether the person whose right arising by situation has been disturbed has as yet made use of that to which the right so disturbed extends.

Illustration.

A, having just occupied land on the bank of a stream, has a natural right to the use of the water of the stream. B higher up has also a natural right to the use of it. B uses it so immoderately that A is not able to exercise his right to the extent

[1] *Crossley* v. *Lightowler*, L. R. 2 Ch. A. 478; 36 L. J. Ch. 584.

[2] *Goodhart* v. *Hyett*, 53 L. J. Ch. D. 219.

of a reasonable use of it. Here, whether A had or had not to any extent appropriated the water before the disturbance of his right by B, the act of B is an injury to A's right, and is actionable without special damage to A being shown.[1]

Disturbances of easements may injuriously affect

1. The occupier.
2. The reversioner.

It is only in cases in which the estate is prejudicially affected by the disturbance that the reversioner is regarded as having sustained an actionable injury.[2]

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[1] *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148.

[2] *Simpson* v. *Savage*, 1 C. B. N. S. 347; 26 L. J. C. P. 50.
Metropolitan Association v. *Petch*, 5 C. B. N. S. 504; 27 L. J. C. P. 330.
Jesser v. *Gifford*, 4 Burr. 2141.
Kidgill v. *Moor*, 9 C. B. 364; 19 L. J. C. P. 177.

OF CAPACITY.

OF THE CAPACITY TO ACQUIRE AN EASEMENT.

Express Grants.

No person can take a grant without his consent, express or implied.

A grant is presumed to be for the benefit of the grantee, and therefore, till disagreement is shown, the law presumes that it had the consent of the grantee, even though the grantee be an idiot, lunatic, infant, or under coverture or other disability.

The grantee may signify his dissent when free from his disability, and provided the grant was disadvantageous to him may avoid it.

But if the grantee on becoming free from his disability signifies his assent or dissent the grant is finally validated or avoided.[1]

Implied Grants.

An implied grant always arises as an incident of an express grant, apart from which the ques-

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[1] See Smith's Law of Real and Personal Property, p. 802, 2nd edition.

tion of capacity cannot arise in respect to the implied grant.

Easements by Prescription.

The presumption of a grant having been made and lost may, it seems, be raised in favour of a person who at the time at which the grant is presumed to have been made was under a legal disability, such as idiotcy, lunacy, infancy, or coverture.[1]

OF THE CAPACITY TO GRANT AN EASEMENT.

Express Grants.

An easement may be granted though the servient owner was, at the time of the grant, under a legal disability, such as any of those before mentioned, provided that on becoming free from the disability the servient owner may avoid the grant if it was to his disadvantage.

Implied Grants.

An implied grant always arises as an incident of an express grant, apart from which the question of capacity cannot arise in respect to the implied grant.

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[1] See Gale, 3rd edition, p. 178.

Easements by Prescription.

A presumption of a grant having been made and lost cannot be raised to the prejudice of a servient owner who, at the time at which the grant is presumed to have been made, was incapable of consenting to it.

Exception.—This rule does not apply to easements of light acquired under the Prescription Act.

Illustrations.

(*a.*) A has had immemorial user of an easement over the tenement of B, and claims to prescribe at common law.

B is shown to have been incapable of consenting to the making of a grant by reason of lunacy or minority 25 years prior to the suit, and it is not shown when his incapacity commenced. He may, therefore, have been incapable at any part of the period of user. The presumption of his having made a grant cannot therefore arise.

(*b.*) A has had immemorial user of an easement over the tenement of B, and claims to prescribe at common law. It is shown that B was, 25 years prior to suit, incapable from lunacy of consenting to the making of a grant. But it is shown that his incapacity commenced 25 years prior to the suit.

Immemorial user being shown, a grant may be presumed, as the circumstances warrant the supposition that a grant may have been made by B or by his predecessors at a date prior to the commencement of the incapacity.

(*c.*) A has had 20 years' enjoyment as of right of an easement over the tenement of B, and claims to prescribe under the Prescription Act. It is shown that at the commencement of the 20 years B was an infant.

This, except in the case of an easement of light, rebuts the presumption of a grant at the commencement of the 20 years, because B was then incapable of consenting to the making of the grant.

In the case of an easement of light, the period of 20 years' actual enjoyment, without interruption, is sufficient by prescription under the Act to enable the dominant owner to acquire the easement, irrespective of the capacity of the servient owner.

If, at the point of time at which it is presumed that the grant was made, the servient owner, or those through whom his right is derived, were capable of making a grant, no subsequent incapacity of such persons can rebut the presumption of a grant.

Illustrations.

(*a.*) A has had 20 years' enjoyment of an easement as of right over the tenement of B, and claims a right to the easement under the Prescription Act.

It is shown that for the period of 10 years, commencing 5 years after the commencement of the period of 20 years, and ending 5 years before its termination, B was insane. As, however, at the commencement of the period of 20 years, being the point at which the grant is presumed to have been made, B was capable of consenting to the making of a grant, the presumption of a grant is not rebutted by B's subsequent incapacity.

(*b.*) B's father, C, whose heir B is, and B, after C's death, have suffered an enjoyment by A of an easement over their tenement for 20 years in the whole. C, at the commencement of the 20 years, was capable of consenting to the making of a grant. B was an infant at C's death, which took place 2 years after the commencement of the period of 20 years.

The subsequent incapacity on the part of the servient owner does not affect the presumption of C's having made a grant in favour of A at the commencement of the period of 20 years.

A grant cannot be presumed if the circum-

stances are such that the servient owner, though capable of making a grant of the right of easement, has been incapable of resisting the user, unless there are other circumstances showing that he afterwards consented to the user.

Exception.—This does not apply to an easement of light acquired under the Prescription Act.

Illustrations.

(*a.*) B, a servient owner, leases his tenement to C. A, the owner of a neighbouring tenement, exercises a right of easement over B's tenement after it is leased to C.

The tenement being leased to C, B has no means of obstructing A's user of the easement.

A grant by B to A cannot be presumed.

(*b.*) In the same circumstances, after the expiry of the lease, B, having notice of the user by A, renews the lease to C without taking any steps, or requiring C to take any steps, to resist the user by A.

Here, as B had the opportunity to resist the exercise of the user by A and did not do so, he may be presumed to have consented to it, and the period of user during the first and renewed tenancies may be reckoned towards the period of enjoyment required to raise the presumption of a grant.

A grant cannot be presumed of a right of easement which has been enjoyed without the knowledge of the servient owner.

Exception.—This does not apply to the case of light so enjoyed, if the easement is claimed under the Prescription Act.

Illustration.

A has for 20 years enjoyed an easement of light passing to his tenement from that of B.

B has been unaware of the enjoyment. His ignorance of the enjoyment of the easement by A does not prevent the acquisition of the right of easement from B.

OF LICENSES

A license is a privilege which any person, quite independently of any tenement of which he is owner or of which he is possessed, obtains from the owner of a tenement in respect of the use of that tenement, either occasionally or for a definite temporary purpose.

A license as to personal things is a grant or a loan.

Illustrations.

A grants to B a license to hunt in A's ground and to carry away deer. Here the permission to hunt on the ground is a license. The permission to carry away deer is a grant of the deer.[1]

A permits B to take a wheel-barrow so many days a week from A's ground. This is a loan.

A license may be granted by parol.

A parol license is void where its effect, if valid, would be to convey an easement.[2]

A parol license though executed, is countermandable.

Exception 1.—A parol license if executed cannot be countermanded in cases where the effect

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[1] *Thomas* v. *Sorrell*, Vaughan, 351.
See *Wood* v. *Leadbitter*, 13 M. & W. 838; & 14 L. J. Exch. 161.

[2] *Hewlins* v. *Shipham*, 5 B. & C. 221; & 4 L. J. K. B. 241.
Cocker v. *Cowper*, 1 C. M. & R. 418; 5 Tyrr. 103.
Fentiman v. *Smith*, 4 East, 107.

of it is not indeed to convey an easement but to authorize the grantee, by doing something on his own land, to abridge or extinguish an easement hitherto possessed by the grantor over the land of the grantee.

Exception 2.—A parol license is not countermandable if it is coupled with a grant of an interest. It is then to be regarded as putting the grantee in possession of the interest so granted for the term of the license or for a reasonable term, but not for longer than the right to possession of the place in or upon which the interest is granted remains in the grantor.

Illustration to Exception 1.

(*a.*) A, by license of B, erects in A's premises a weir in a stream at a point above B's mill, to which the water had been accustomed to flow, and thus diminishes the advantage which B had of right and by way of easement enjoyed in the use of the water of the stream. The license is irrevocable.[1]

Illustrations to Exception 2.

(*b.*) A gives permission to B to stack hay on A's land and carry it away.

This license is not revocable till B has had a reasonable time to stack and carry away the hay.[2]

In the same circumstances A, after giving the permission, sells the land to C. A's rights to possession of the land on which he had given B permission to stack the hay having ceased the license ceases.[3]

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[1] *Liggins* v. *Inge*, 7 Bing. 682; 9 L. J. C. P. 202.

[2] *Webb* v. *Paternoster*, 2 Roll. Rep. 143, 152.

[3] *Plummer* v. *Webb*, Noy's Rep. 98.

(*c.*) A's hay was seized by his landlord as a distress for rent and sold, the conditions of sale being that the purchaser, B, might come on A's ground from time to time to remove the hay. A assented to this. B removed some of the hay and then A locked the gate. B broke open the gate. The license given by A being irrevocable, A cannot recover damages from B.[1]

(*d.*) A authorizes B to dig for tin in A's property and to dispose of the tin on certain terms for 21 years.

A has granted an irrevocable license during 21 years to take the ore which shall be found.[2]

(*e.*) A grants B a license to hunt on his land and take away game. This is a grant of the game with a license to come and carry it away. The license is not revocable until it has been executed for a reasonable period.

The words "coupled with a grant of an interest" in Exception 2, mean coupled with such a valid grant of an interest as may be made by parol, as an interest in stacking hay, removing hay, digging for ore, and taking game; but do not include an interest which may only be granted by deed.

Illustrations.

(*a.*) A, without deed, permits B to come on his land and make a water-course to flow on B's land. There being here no valid grant of the water-course, which can only be granted by deed, the permission, though coupled with an interest, is a mere license, and as such revocable. *Case put in Wood* v. *Leadbitter*, 14 L. J. Exch. 165.

(*b.*) A grants B permission to hunt or shoot on his land, but does not grant him permission to carry away game; as the parol grant to use the land for hunting or shooting does not convey

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[1] *Wood* v. *Manley*, 11 Ad. & E. 30; 9 L. J. N. S. Q. B. 27.

[2] *Doe* v. *Wood*, 2 B. & Ald. 738.

any valid interest in the land, the permission is a mere license and revocable. *Case put in Wood* v. *Leadbitter*, 14 L. J. Exch. 165.

Exception 3.—A parol license is not countermandable if the licensee, acting on the permission granted, has executed a work of a permanent character and has incurred expense in its execution.

Illustration to Exception 3.

A, by license of B, by a permanent structure encloses on A's own ground, with B's consent, an area through which B has a right to receive, and has been accustomed to receive, light and air. In consequence of the enclosure B receives no light or air by the area. The license is irrevocable.[1]*

A parol license, though executed, and even though valuable consideration may have been given for it, is countermandable in other cases.

Illustration.

A issues tickets, at one guinea each, permitting the holders to come on his enclosure to witness some races. B becomes the

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[1] *Winter* v. *Brockwell*, 8 East, 309.

* NOTE.—The following case seems in conflict with the rule. A, by license of B, built a cottage on the waste ground of B, and lived in it for a year and a half. *Held*, that the license was revocable.

Rex v. *Inhabitants of Houndon-on-the-Hill*, 4 M. & S. 565.

The question, however, in the case was whether the license was such as to confer a settlement, and it was decided that it did not do so, on the ground that the license did not confer a grant, *i. e.*, *a grant of the land* on which the cottage was built. This, of course, it did not, because such a grant must be by deed, not by parol. But the license may none the less have been irrevocable if the cottage were a permanent structure.

holder of one of these tickets, for which he has paid one guinea. A may at any time revoke the permission to enter and be on the enclosure, and may turn B out of it.[1]

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[1] *Wood* v. *Leadbitter*, and the cases cited in it, 13 M. & W. 838; 14 L. J. Exch. 161.

Viz., *Webb* v. *Paternoster*.
Wood v. *Lake*.
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